SUPREME COURT OF THE UNITED S

OCTOBER TERM, 1974

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NO. 73-1723

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JOHN L. HILL,
ATTORNEY GENERAL OF TEXAS,
Appellant

V.

MICHAEL L. STONE, ET AL.,
Appellees

* * *

On Appeal from the United States District Court for the Northern District of Texas

* * *

BRIEF FOR THE APPELLANT

* * *

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SUPREME COURT OF THE UNITED STATES

NO. 73-1723

JOHN L. HILL, Attorney General of Texas
Appellant,

v.

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ON APPEAL FROM THE
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THE OPINIONS BELOW

The opinion of the three-judge federal court sitting as the District Court for the Northern District of Texas, Fort Worth Division, (J.S. 5a-27a) is reported at 377 F.Supp. 1016 (1974).

JURISDICTION

The judgment of the three-judge federal court declaring certain laws of the State of Texas unconstitutional, empaneled pursuant to 28 U.S.C. Sections 2281 and 2284, was entered on March 25, 1974, (J.S. 1a - 4a). Notice of Appeal was filed by Appellant on April 18, 1974 (J.S. 1b). On April 25, 1974, this Court granted Appellant's application for a partial stay. The appeal was docketed on May 17, 1974, and probable jurisdiction noted on October 15, 1974. The jurisdiction of this Court to review this

decision by direct appeal is conferred by 28 U.S.C. Sections 1253 and 2101(b).

QUESTION PRESENTED BY THE APPEAL

The following question is presented by this appeal:

> Are Texas election laws limiting the franchise in general obligation tax bond elections to persons who own taxable property which has been rendered for taxation consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL AND STATUTORY LAWS INVOLVED

The validity of Art. VI, Sections 3 and 3a, Tex. Const., Articles 5.03, 5.04(a) and 5.07, Tex. Election Code and the Charter of the City of Fort Worth, Ch. 25, Section 19, are here involved. (J.S. 1c - 6c).

STATEMENT OF THE FACTS OF THE CASE

Article VI, Section 3a (J.S. 1c) of the Texas Constitution provides that voters voting on bond issues which will be paid in whole or in part from tax revenues must be "only qualified electors who own taxable property in the . . . political subdivision. . .where such election is held, and who have

duly rendered the same for taxation, . . ." In 1969, when it first became apparent from the decisions of this Court in Cipriano v. Houma, 395 U.S. 701 (1969), and Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969), that the above and related provisions of the Texas Constitution and Statutes might be incompatible with the United States Constitution, the Texas Attorney General's Office, and the bond industry and their attorneys, devised a dual-box election procedure whereby at each tax bond election two separate ballot boxes are provided (App. 65-67). In one box only resident qualified electors who own taxable property and who have duly rendered the same for taxation are allowed to vote, and in the other box, all other resident qualified electors (who are otherwise qualified, but do not own taxable property which has been duly rendered for taxation) are allowed to vote. The votes cast in each box are recorded separately, and the returns are canvassed in such manner as reflects separately the votes cast by the two respective groups of electors.

Bonds have only been approved by the Texas Attorney General if a majority of the property owners who have rendered their property approved, and if additionally, a majority of all voters approved. This procedure assured that bonds issued were compatible with both the Texas Constitution and the United States Constitution. The dual-box election procedure was followed in the general obligation tax bond election made the subject of this case (App. 65-67, 74).

On April 11, 1972, the City of Fort Worth

held a tax bond election to seek authorization to issue bonds to build a library system (App. 86). The ordinance authorizing the election stated that the election was to ". . . be held and conducted, in effect, as two separate but simultaneous elections, to-wit: one election at which only the resident, qualified electors who own taxable property in the City and who have duly rendered the same for taxation shall be entitled to vote on said propositions, and another election at which all other resident, qualified electors of the City shall be entitled to vote on said propositions. The votes cast at each of said separate but simultaneous elections shall be recorded, returned, and canvassed separately." (App. 64)

The result of the election was as follows (App. 53-54, 86-87):

OWNERS OF PROPERTY
RENDERED FOR TAXATION

FOR	10,849
AGAINST	12,234

NON-RENDERERS

FOR	3,758
AGAINST	1,132
TOTAL FOR	14,607
TOTAL AGAINST	13,366

On April 17, 1972, the City Council approved and adopted the election (App. 53-54) and, there-

after, acting pursuant to the Texas election laws, refused to sell the library bonds. On that same day, the appellees filed a class action pursuant to Rule 23, F.R. Civ. P. requesting that a three-judge district court be convened under the authority of 28 U.S.C. Sections 2281 and 2284 (App. 11-12).

John L. Hill, Attorney General of Texas, was joined as defendant because Texas law requires that said official certify the legal validity of the proposed municipal bond issue (App. 33, 51). V.T.C.S. Art. 709d (App. 49-50). After the bonds have been approved by the Attorney General, Texas statutes provide that they are incontestable except for fraud and unconstitutionality.

Appellees requested the District Court to declare the Texas election laws involved to be in irreconcilable conflict with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (App. 16-17). Appellees further requested the District Court to enjoin appellants from giving any force or effect to the Texas election laws in controversy as they might relate to the outcome of the bond election held on April 11, 1972, or any other such elections thereafter held (App. 17-20).

The case was submitted to the District Court on stipulated facts as they appeared in pages 19 through 43 of the District Court's Pre-Trial Order entered on November 8, 1972 (App. 38-87).

On March 25, 1974, the three-judge court entered a judgment and opinion (J.S. 1a - 27a)

declaring the questioned Texas election laws to be in violation of the Fourteenth Amendment to the United States Constitution and enjoined appellants from giving any force or effect to said laws. The District Court stayed its judgment for ten days to enable the parties to submit an application for stay to the Circuit Justice, the Supreme Court, or a Justice thereof (J.S. 3a).

On the 2nd day of April 1974, appellant filed a Motion to Modify Judgment and/or for Partial Stay in the District Court requesting a modification of the judgment to provide that the Texas dual-box election procedure in bond elections be continued pending the final outcome of this cause before the Supreme Court. The District Court entered an order on April 9, 1974, denying the appellant's Motion. The District Court granted an additional five day stay of their judgment to enable the parties to submit an application for stay to the Circuit Justice, the Supreme Court, or a Justice thereof.

Appellant filed an application for a partial stay of the District Court's judgment with the Circuit Justice, Mr. Justice Powell, on April 15, 1974. The Circuit Justice requested a reply to appellant's application from appellees. Upon receipt of the reply, this Court granted a partial stay of the District Court's judgment by order entered on April 25, 1974.

SUMMARY OF ARGUMENT

The Texas constitutional and statutory elec-

tion laws limiting the franchise in general obligation tax bond elections to persons who own taxable property which has been duly rendered for taxation fully comply with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The very nature of a general obligation bond and the universality of property subject to taxation in Texas, combine to lend constitutional validity to the property rendering requirements which, although involuntarily disenfranchising no one, limits the vote to those who are "primarily interested" in the outcome of an election, the object of which is to authorize an issue of bonds payable solely from property taxes. The Equal Protection Clause and recent decisions of this Court indicate that the challenged Texas election laws serve a valid state interest in a constitutionally permissible manner.

ARGUMENT

The issue involved in this appeal is of great importance to the State of Texas and the political subdivisions thereof, as well as more than one-fourth of all the states which in one manner or another qualify the right to vote in general obligation bond elections on the basis of property ownership or taxation. The importance of the issue is accentuated by its potential effect on the financing which is vital to the function of the states and their subdivisions in erecting and maintaining needed public improvements. In making a final determination of the issue involved in this appeal, this Court will unquestionably and substantially affect the functions of local government as well as the continued viability of reasonable state voting qualifications in this area.

A. PREVIOUS SUPREME COURT DECISIONS ON VOTING RESTRICTIONS AND THE FOURTEENTH AMENDMENT

The United States Supreme Court has been presented over the last decade with numerous controversies concerning the qualifications which various states have placed upon the exercise of the franchise in state and local elections. Although each of the decisions of this Court has been concerned with the particular type of election at hand and its circumstances, those same decisions have been applied generally in virtually every area of election law by this Court as well as the various lower courts, state and federal.

As a general proposition, the states have ". . .broad powers to determine the conditions under which the right of suffrage may be exercised." Lassiter v. Northampton Election Board, 360 U.S. 45, 50 (1959). This Court in Lassiter upheld North Carolina's literacy requirement and determined that voter qualification requirements may be sustained either when they promote intelligent or responsible voting (voting competence), or when they perform either of these functions. This Court also cited as constitutionally permissible qualifications based on age, residence, and previous criminal record.

In keeping with the principle of Lassiter, this Court has condemned voter qualifications which bear no demonstrable relation to the promotion of intelligence and responsibility in voting. Carrington v. Rash, 380 U.S. 89 (1965) (military

personnel); and Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (poll tax).

An equally important basic premise stressed by this Court is that the issues in any election should be decided by a majority of the people concerned with the outcome. Reynolds v. Sims, 377 U.S. 533 (1964); Gray v. Sanders, 372 U.S. 368 (1963); and Baker v. Carr, 360 U.S. 186 (1962). However, ". . .once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." Harper, supra.

In 1969 and 1970, this Court rendered several decisions holding invalid state laws which selectively granted the right to vote on grounds that they denied equal protection under the Fourteenth Amendment. The first of these decisions was Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969). In Kramer, this Court struck down a New York statute which granted the right to vote in a local school board election only to those who owned or leased taxable real property in the district or were parents or custodians of children enrolled in the public schools. On the same day this Court decided Kramer, it also handed down Cipriano v. City of Houma, 395 U.S. 701 (1969). The Cipriano decision invalidated a Louisiana statute which permitted only property owners to vote on the question of approving bonds that were to be financed exclusively from the revenues of a municipal public utility. The third important decision was City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970), in which an Arizona constitutional limitation of the

franchise in general obligation bond elections to persons who are qualified electors and also real property taxpayers, was held to be in violation of the Equal Protection Clause.

The decisions of this Court in Cipriano and Kramer were carefully reviewed by appellant, Texas Attorney General, with respect to their application to the Texas election laws governing general obligation tax bond elections. No changes in Texas voter qualifications were deemed necessary in light of those decisions because this Court's opinions were not inclusive of the facts or the law surrounding Texas tax bond elections. However, in order to protect the outstanding public securities of this State and to insure that any subsequently voted securities would not be subject to attack based upon a controlling, unfavorable decision of the Phoenix case, which was at that time pending in this Court, it was decided that tax bond propositions should be covered by a dual-box election. (App. 65-67)

The result of this dual-box election policy was to require that issuers of tax bonds be required to meet all the voter qualification tests of the Texas Constitution and statutes, and in addition thereto, be required to submit tax bond propositions to the balance of the otherwise qualified electorate. Before approval would be given in the form of the Attorney General's opinion as to the validity of securities, any and all underlying propositions must have been approved not only by the owners of taxable property duly rendered, voting in a separate box, but also by the aggregate of all electors.

This policy was viewed originally as a temporary measure, on the assumption that the final determination of the Phoenix case would put the question to rest. However, that decision did not settle the issue in Texas tax bond elections.

The precedents of Kramer, Cipriano and Phoenix constitute the framework for the District Court's judgment that the Texas constitutional and statutory qualifications for the exercise of the franchise in a general obligation tax bond election are in violation of the Fourteenth Amendment. The basic test announced in those cases and ostensibly applied by the District Court in this case requires that the Court determine whether the voter exclusions are ". . .necessary to promote a compelling state interest." Kramer, at 627.

There are significant differences between the three cases cited above and the provisions of the Texas election laws relevant to this case. In Cipriano, this Court held that ownership of property, as a restriction, is irrelevant to an election for the approval of bonds that would be financed by revenues of a public utility, thereby substantially and directly affecting property owners and non-property owners alike. The present case does not concern revenue bonds (App. 78-79). Both Kramer and Phoenix basically involved voting restrictions based on real property taxation under circumstances which indicated that such a classification excluded many persons significantly affected by way of both burden and benefit. Pointedly, this Court in Phoenix limited its review to this question: "Does the Federal Constitution permit a State to restrict

to real property taxpayers the vote in elections to approve the issuance of general obligation bonds?" The Texas law does not restrict voting rights to owners of real property. Indeed, under Art. 7145 (1960), V.T.C.S. "All property, real, personal or mixed, except such as may be hereinafter expressly exempted, is subject to taxation and the same shall be rendered and listed as herein prescribed." (App. 25)

Stewart v. Parish School Board of Parish of St. Charles, 310 F.Supp. 1172 (E.D.La. 1970), aff'd mem., 400 U.S. 884 (1970), is another case in the progression which merits discussion. The United States District Court for the Eastern District of Louisiana struck down Louisiana statutes which restricted eligibility to vote in tax bond elections to property taxpayers and also weighted each elector's vote by the monetary value of his assessed property. This District Court said that the affluence of the voter was not such a compelling state interest as to justify the denial of the vote to some and the dilution of the votes of the majority. Texas has no such problem. It is immaterial to the right to vote in a bond election whether one's ownership of property be great or small. DuBose v. Ainsworth, 139 S.W.2d 307 (Tex.Civ.App. 1940, writ dis.). Also, in Stewart, the District Court noted in footnote three (page 1173) that under Louisiana law the term "property taxpayer" equates with the term "real property taxpayer" or "landowner". Texas makes no such distinction and, to the contrary, generates a substantial amount of tax revenues from personal property as evidenced in the Pre-Trial Order (App. 67, 80-82).

In Montgomery Independent School District v. Martin, 464 S.W.2d 638 (Tex. 1971), the Texas Supreme Court faced the precise issue of this case. After consideration of the Kramer, Cipriano, Phoenix and Stewart cases, the Court determined that,

> "Unlike those restrictive voting laws which have been declared unconstitutionally narrow and limited, the laws in Texas have consistently granted the right to vote in general obligation bond elections to all who own personal property as well as to those who own real property. Texas Public Utilities Corporation v. Holland, 123 S.W.2d 1028 (Tex.Civ.App. 1939, writ dis.). In Handy v. Holman, 281 S.W. 2d 356 (Tex.Civ.App. 1955, no writ), the right to vote of forty resident citizens was challanged because immediately before participating in a bond election, they had each rendered personal property valued at $100 for the very purpose of voting in a bond election. The court upheld their right to vote and also said that electors should not be 'parsed' out of their constitutional right to vote by reason of any shortcoming in compliance with statutory requirements concerning the proper and timely rendition of personal property."

It is the contention of the Attorney

General, and we agree, that voter qualifications of ownership under the Texas constitutional and statutory provisions stated above, as interpreted by our decisions, are so universal as to constitute no impediment to any elector who really desires to vote in a bond election. A voter is qualified if he renders any kind of property of any value, and he need not have actually paid the tax.

The quoted provisions of the Constitution and the Education Code requiring the property owner to duly render his property for taxation have been often construed by the Texas courts in connection with voting rights. Property is 'duly rendered' within the meaning of the Texas Constitution if the property is placed on the tax rolls by the tax assessor instead of by the property owner. Texas Public Utilities Corporation v. Holland, supra, or by some other person such as a husband, partner, agent or co-tenant and even though the owner's name may not appear on the tax rolls; Markowsky v. Newman, 134 Tex. 440, 136 S.W.2d 808 (1940); Royalty v. Nicholson, 411 S.W.2d 565 (Tex.Civ.App. 1967, writ ref. n.r.e.); Lucchese v. Mauermann, 195 S.W. 2d 422 (Tex.Civ.App. 1946, writ ref. n.r.e.), cert. denied, 329 U.S. 812, 91

L.Ed. 693, 67 S.Ct. 633 (1947); Richter v. Martin, 342 S.W.2d 342 (Tex.Civ. App. 1961, no writ); Campbell v. Wright, 95 S.W.2d 149 (Tex.Civ.App. 1936, no writ); or when one makes his rendition out of time and for the very purpose of qualifying as a voter. Markowsky v. Newman, supra; Handy v. Holman, 281 S.W.2d 356 (Tex.Civ. App. 1955, no writ).

It thus appears that those who own anything can vote in a bond election if they render their property; and they are deemed by the decisions of Texas to have rendered their property if they get their property on the rolls in any manner in advance of the election. In our opinion, the requirement that the voter in a general obligation bond election must get his property on the rolls is in the interest of sound government and affords equal treatment of all citizens. One who is willing to vote for and impose a tax on the property of another should be willing to assume his distributive share of the burden. This is the manner in which the Texas Constitution, as approved by the entire citizenry of the state, provides inducement for those who wish to participate in the decision making process in a School District to assume their rightful portion of the burden they help to create."

* * *

> "To disclose one's share of the total burden for which he is responsible in a bond election requires no more than the law universally expects. To allow some property owners to vote in that kind of an election, and at the same time to permit them to avoid their fair share of the resulting obligation, would confer preferential rights. This would be a denial of equal protection to another segment of citizens."

This Court, in Kramer and Cipriano, left open the question of whether a state might under some set of circumstances qualify the franchise by limiting access to the ballot to those "primarily interested." This Court in Kramer explained that:

> ". . .whether classifications allegedly limiting the franchise to those resident citizens 'primarily interested' deny those excluded equal protection of the laws depends, inter alia, on whether all those excluded are in fact substantially less interested or affected than those the statute includes." at 395 U.S. 632

It is significant to note that the test was stated in terms of "primarily interested" rather than sole or exclusive interest.

B. TEXAS PROPERTY RENDERING REQUIREMENTS DO NOT CREATE A CLASSIFICATION.

Appellant further contends that the Texas election laws do not create a classification at all. Since Texas law subjects all property to taxation, the only additional qualification required for eligibility to vote in a general obligation bond election is that of rendering property for taxation. Electors, such as appellees, who have either ignored or who refuse to comply with their legal duty to render their property simply disenfranchise themselves. Also, as was the situation in the absentee ballot case of McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802, 807 (1969), there is no evidence that the applicable Texas election laws absolutely prohibit anyone from exercising the franchise. Kramer, supra at 627. More recently in Rosario v. Rockefeller, 410 U.S. 752 (1973), this Court, in reviewing cases cited for the proposition that the New York political party enrollment deadline disenfranchised otherwise qualified voters unconstitutionally, stated at 410 U.S. 757 and 758:

> "In each of those cases, the State totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote. . .
>
> * * *
>
> Hence, if their (petitioners) plight can be characterized as disenfranchisement at all, it was not caused by Section 186, but by their own failure to take timely steps to effect their enrollment."

The District Court contended that extending the rationale of Rosario to the Texas rendering laws would be inappropriate because such an extension could also support an impermissible poll tax. (J.S. 9a) Harper v. Virginia State Board of Electors, 383 U.S. 663 (1966). Also the District Court concluded that Rosario was inapplicable here because New York's enrollment requirement ". . .was a reasonable state effort to preserve the integrity of the electoral process, a goal the Court called 'legitimate and valid.' The Texas rendering requirement, by contrast, is primarily an attempt to aid the states' taxation efforts, and is not designed to protect or improve the electoral process." (J.S. 26a)

The District Court, although certainly recognizing the tax collection aspects of the Texas rendering system, failed to recognize the valid state interest in protecting the integrity and quality of the electoral process through the rendering requirement. Since only property renderers will ever be called upon to repay the bonded indebtedness (App. 79), and the definition of property in Texas is so universal in scope (App. 25), the state has a sufficient interest in seeking to exclude those not "primarily interested" in the election subject. Indeed, it is essentially the responsibility of the state to establish reasonable ". . .standards designed to promote the intelligent use of the ballot." Lassiter, supra at 51. In light of this duty, it is entirely rational for the Texas election laws to exclude non-renderers in tax bond elections since they have no cognizable incentive to vote either cautiously or intelligently. Indeed, non-renderers have no reason to vote against any such tax proposal

at all. Such a non-renderer would stand to reap benefit without corresponding burden. By excluding those otherwise qualified voters who refuse to render their own property according to the laws of this State while attempting to impose a tax on the property of others, the Texas election laws create a minimal qualification requirement which serves to protect and enhance the electoral process. However, the Texas laws do not exclude anyone because of the way they might vote. That principle is true whether applied to the non-renderer, who arguably would be more inclined to approve any tax bond issue because he would not be asked to pay the indebtedness incurred, or to the property renderer, who would be inclined to make a more critical analysis of the need for the tax bond issue in view of his ultimately increased tax burden. Non-renderers are excluded because their participation in a tax bond election does not correspond and, in fact, is minimal in comparison to the interest of property renderers who, being primarily affected, necessarily bear the entire burden of the resulting tax indebtedness.

Furthermore, equating the Texas rendering laws with an impermissible poll tax fails to recognize the basic distinction between the two, to-wit: a poll tax is a fee paid for the privilege of casting a vote, whereas the Texas election laws require the rendering of property precedent to voting on the privilege of paying taxes, the very subject of the election. Also, a poll tax applies to every election held, no matter what the subject of the election might be.

C. "REASONABLENESS" IS THE PROPER CONSTITUTIONAL STANDARD TO BE APPLIED.

In Reynolds v. Sims, 377 U.S. 533 (1964), this Court summarized the historical application of the Fourteenth Amendment stating that ". . .the concept of equal protection has been tranditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." This Court has recognized that the traditional application of the Equal Protection Clause was restricted to a view of the "reasonableness" of the state classification made the subject of complaint. McGowan v. Maryland, 366 U.S. 420, 426 (1961). Indeed, it was not until Kramer that state voter qualifications came under the full impact of the strict judicial scrutiny of the compelling-state-interest test. Dunn v. Blumstein, 405 U.S. 330, 363 (1972) (Blackmun, J., concurring).

Mr. Chief Justice Burger dissenting in Dunn pointedly described the impracticality of the compelling-state-interest test stating that

> "The holding of the Court in Pope v. Williams, 193 U.S. 621, 24 S.Ct. 573, 48 L.Ed. 817 (1904), is as valid today as it was at the turn of the century. It is no more a denial of equal protection for a State to require newcomers to be exposed to state and local problems for a reasonable period such as one year before voting, than it is to require children

> to wait 18 years before voting. Cf. Oregon v. Mitchell, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970). In both cases some informed and responsible persons are denied the vote, while others less informed and less responsible are permitted to vote. Some lines must be drawn. To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection."

Mr. Chief Justice Burger's dissent in Dunn foreshadowed the rendition of four decisions by this Court in 1973 which further illustrate the inadequacy of the compelling-state-interest test as an equal protection standard, as well as confining it to restricted circumstances, if not actually forewarning of its eventual demise.

In Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973), Mr. Justice Rehnquist expressing the view of six members of this Court held that the provisions of the California Water Code which permitted only landowners to vote in water storage district general elections and by apportioning votes in the election according to the assessed valuation of the land to be constitutionally permissible. This Court went to great lengths to explain that by reason of the

water storage district's limited purpose and its disproportionate effect on landowners as a group, the California laws did not deny equal protection by limiting the franchise to district landowners, thereby denying the vote to non-landowner residents, even though they may be farm lessees, or by weighting votes according to the assessed valuation of the land. Although obviously dealing with state qualifications on the franchise which "absolutely prohibited" interested persons, otherwise qualified to vote, from exercising the franchise, Kramer, supra at 627; McDonald, supra at 807-808, this Court in Salyer refused to apply the compelling-state-interest test. Rather, this Court returned to the more practical McGowan test stating that

> ". . .the question for our determination is not whether or not we would have lumped them together had we been enacting the statute in question, but instead whether 'if any state of facts reasonably may be conceived to justify' California's decision to deny the franchise to lessees while granting it to landowners. McGowan v. Maryland, 366 U.S. 420, 426, 6 L. Ed.2d 393, 81 S.Ct. 1101 (1961).

Mr. Justice Douglas, speaking for the dissent stated that

> "Provisions authorizing a selective franchise' are disfavored, because they 'always pose the danger of denying some citizens any effective voice

> in the governmental affairs which substantially affect their lives.' Kramer v. Union School District, 395 U.S. 621, 627, 23 L.Ed.2d 583, 89 S. Ct. 1886. In order to overcome this strong presumption, it had to be shown up to now (1) that there is a compelling state interest for the exclusion, and (2) that the exclusions are necessary to promote the State's articulated goal. Phoenix v. Kolodziejski, supra; Cipriano v. City of Houma, 395 U.S. 701, 23 L.Ed.2d 647, 89 S.Ct. 1897; Kramer v. Union School District, supra. See also Police Jury of Vermillion Parish v. Hebert, 404 U.S. 807, 30 L.Ed.2d 39, 92 S.Ct. 52; Stewart v. Parish School Board of St. Charles, 310 F.Supp. 1172, aff'd., 400 U.S. 884, 27 L.Ed.2d 129, 91 S.Ct. 136."

The dissent went on to point out that the characterization of the water storage district as a "special-purpose unit of government assigned the performance of functions affectiving definable groups of constitutents more than other constituents," citing Avery v. Midland County, 390 U.S. 474, 485 (1968), was unrealistic in view of Hadley v. Junior College District, 397 U.S. 50 (1970). This Court in Hadley applied the compelling state interest test because the special purpose junior college district exercised generalized powers which ". . .while not fully as broad as those of the Midland County Commissioners, certainly show that

the trustees perform important governmental functions. . .and have sufficient impact throughout the district to justify the conclusion that the principle which we applied in Avery should also be applied here." (Emphasis added by the Court).

On the same day that Salyer was handed down, this Court rendered a per curiam decision in Associated Enterprises, Inc. v. Toltec Watershed Improvement District, 410 U.S. 743 (1973). In Associated Enterprises, this Court determined that a Wyoming law providing that a watershed district could be established only by referendum in which only landowners could vote and their votes were weighted according to acreage owned was constitutionally valid. Again, this Court based its decision on the premise that the watershed district was a special-purpose unit of government with limited purposes. Quite significantly however, this Court went on to note that no denial of equal protection was involved because the challenged statute ". . . was enacted by a legislature in which all of the State's electors have the unquestioned right to be fairly represented. . ." and because the popularly-elected board of supervisors of the affected conservation district must approve the creation of a watershed district. Id., at 744 and 745.

The popular representation of all qualified voters in Texas at the state level, like those in Wyoming, is unquestioned through compliance with Reynolds. Likewise, there is no question that Appellees are adequately and fairly represented by the popularly-elected City Council of Fort Worth under the holding of Avery. Therefore, the only

distinction between the non-landowner residents' relationship to the elections in Salyer and Associated Enterprises compared with the relationship of the non-rendering Appellees to the tax bond elections is the difference between a "special-purpose district" and a special purpose bond election. Certainly this is a distinction without a difference.

In Kramer Mr. Justice Stewart, in his dissent, maintained, in effect, that the franchise is not necessarily fundamental in special purpose elections because through application of Reynolds, a person's interests are well protected through the right to vote in all general, representative elections on a federal as well as state and local level. Specifically, Mr. Justice Stewart stated, at 395 U.S. 640, that

> "(W)e are dealing here, not with a general election, but with a limited, special-purpose election. The appellant is eligible to vote in all state, local, and federal elections in which general governmental policy is determined. . .He clearly is not locked into any self-perpetuating status of exclusion from the electoral process."

Mr. Justice Stewart's reasoning was interpreted, in 59 Cornell L.Rev. 687, 705 (1974), to indicate that

> "(W)hat underlies these opinions is a philosophy articulated by Justice Stewart that when voters are protected

> by the one man - one vote principle in general elections on the state and federal levels, it is both unnecessary and undesirable to rigidly apply the Reynolds rule to situations where different groups have substantially different interests in the matters of a particular unit of local government."

In a third decision rendered the same day as Salyer and Associated Enterprises, this Court determined in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) that the Texas dual approach to public school financing was constitutional. Mr. Justice Powell speaking for the majority upheld the Texas school financing system against an equal protection challenge. The Texas school financing system, to a significant degree, apportioned school district revenues on the basis of the value of taxable property in the district. The varying wealth of each district resulted in disproportionate school revenues being allocated to the different districts. Although no compelling reason for the Texas system was apparent, the constitutionality of the system was upheld because the majority concluded that it was rational. The compelling-state-interest test was not applied because the "fundamental" interest necessary to invoke strict judicial scrutiny was found lacking.

Significantly, this Court in Rodriguez decided to restrain the expansion of the "fundamental" rights analysis in equal protection cases. In the past, this Court had extended the "fundamental" rights approach to voter qualification cases even

though such rights were not explicitly found in the United States Constitution. Rodriguez, (Marshall, J., dissenting). Furthermore, the Constitution of the United States has never specifically guaranteed the right to vote in state elections. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875); Harper, 383 U.S. at 665; Rodriguez, 411 U.S. at 35.

Furthermore, in analyzing the Salyer decision, it was stated in 59 Cornell L.Rev. 687, 702 (1974), that

> "It has been observed that underlying the early reapportionment decisions was a basic recognition of the right to vote as fundamental, and that this recognition was a generating factor in the development of the one man - one vote principle. In Salyer, by expressly finding the Reynolds rule to be inapplicable to this special purpose district, the Court has implicitly acknowledged that within this context, the right to vote is not fundamental. Once divested of this status, albeit implicitly, Justice Rehnquist's application of the rational relationship test logically follows."

This Court's decisions in Salyer, Associated Enterprises, Rodriguez and Rosario v. Rockefeller, have been interpreted as follows:

> "In the context of voter qualifications, neither history, reason nor the

> Court's opinions in Salyer and Associated Enterprises suggest any basis for a distinction based upon the generality of governmental services offered. Voter qualification problems do not involve the same political sensitivities as apportionment problems, and there is no history of refusal to decide voter qualification cases on the grounds of non-justiciability. Accordingly, a logical inference from the limitation on the compelling state interest test as an equal protection standard in voter qualification cases to elections for officials of local units of government exercising general governmental powers is a dissatisfaction with the basic rule being limited, and a determination, at the very least, not to permit its further expansion. The recent decision in Rosario v. Rockefeller holding the compelling interest standard inapplicable to procedural limitations on voting qualifications further bears this out." (Emphasis added.)

Lee, Mr. Herbert Spencer and the Bachelor Stockbroker: Kramer v. Union Free School District No. 15, 15 Ariz. L.Rev. 457-477 (1973). See also, The Supreme Court, 1972 Term, 87 Harv.L.Rev. 94-105 (1973).

The decisions of this Court in Salyer and Associated Enterprises were also analyzed by the

Court of Appeals of New York in Franklin v. Krause, 32 N.Y.2d 234, 298 N.E.2d 68, 71 (1973). The Court there determined that the plan of apportionment and voting for the Nassau County board of supervisors and the system of weighted voting involved were not in violation of the Equal Protection Clause. The Court, 298 N.E.2d at 71, stated in a footnote that:

> "In two very recent cases it was held that special-purpose units of government such as water and sewage districts could operate outside strict one man, one vote principles because they affected 'definable groups of constituents more than other constituents', and that certain groups could thus have disproportionate voting power (Salyer Land Co. v. Tulare Lake Basin Water Stor. Dist., 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973); Associated Enterprises v. Toltec Watershed Improvement Dist., 410 U.S. 743, 93 S.Ct. 1237, 35 L.Ed.2d 675 (1973). These decisions do not specifically extend to units of general local government apportionment such as we find in the instant case. There may be, however, further indication in these cases that the Supreme Court does not demand strict one man, one vote principles at the local level."

Significantly, that Court interpreted the Salyer and Associated Enterprises decisions as indicating this

Court's intention to return the question of general local government apportionment plans, from a constitutional standpoint, to the "reasonableness" standard.

In a lengthy analysis of the Salyer decision, in 72 Michigan L.Rev. 868 (1974), it was stated at pages 878 and 879 that

> "Again, like the popular-election test (Hadley), the Kramer test's prime virtues are simplicity of application and assured protection for the disenfranchised citizen. Its disadvantages are twofold. First, it is a rigid test that is difficult to satisfy. Even if the precision requirement is met, a restriction of the franchise to a specially interested group will apparently be upheld only if it is necessary to promote a compelling state interest. Moreover, under Avery, the critical decision is made by focusing on the unit's powers and its impacts on citizens generally, while the Kramer method, at the strict scrutiny stage, analyzes and compares the interests of specific individuals. The standard of precision required by the latter analysis is very high; the former method, in contrast, can be satisfied by looking at general conditions, rather than at the situations of particular individuals.

Second, the Kramer method is over-inclusive, as was the Hadley popular-election test. The application of strict scrutiny to all selective enfranchisements without a preliminary inquiry similar to the powers-and-impacts analysis of Avery neglects the possibliity that, in some restriction cases, it may not be appropriate to give the disenfranchised citizen political influence in the unit or decision in question because he is not affected by that unit or decision to the same degree as are others. For the Court in Kramer, however, the presumed possibility that the disenfranchised citizen needs representation was sufficient to trigger the application of strict scrutiny. The Court may have felt that it was not necessary to make an initial inquiry into impacts in restriction cases, as it was in malapportionment cases such as Avery, because the total denial of the vote seems a more grievous violation of the right to effective representation than does dilution of malapportionment. However, a restriction on the franchise in an election involving a local government unit the activities of which have varying degrees of impact may be a less serious violation of the interest in representative government than severe malapportionment of districts in a general governing unit. In

short, in restriction cases, also, there exists a need for a method that can accommodate this possibility.

At pages 882-884, the analysis continues stating that

> "Like Avery, Salyer does not propose a blanket test. Rather, it attempts to define those cases in which a structure in accord with one person - one vote and the unrestricted franchise is not the most appropriate solution to the representational problem. Again like the test applied in Avery to a malapportionment case, this method focuses on the nature of the individual-institutional link by inquiring whether all citizens are affected in ways that are sufficiently uniform that each citizen should have equal representation. In extending this approach to Salyer, which also involved a restriction, the Court relaxed the prior rigid approach it had taken in restriction cases."
>
> * * *
>
> "The question asked by the Court was whether the duties of the unit or official in question are 'far removed from normal governmental activities.' The Tulare Lake Basin Water Storage District met this test because it does not provide 'general public

> services such as schools, housing, transportation, utilities, roads or anything else ordinarily financed by a municipal body.' To fulfill this element, then, the primary requirement seems to be that the unit in question be functionally specialized or unusual, but whether a unit provides an unusual or specialized service should not be determinative in an evaluation of the constitutionality of the related voting scheme. The critical question is, rather, whether the impact on the citizens is so uniform that each citizen should participate equally in political decision-making." (Emphasis added.)

Judge Thornberry, in his Memorandum Opinion in this case, argues that the interest of the State of Texas in limiting the electorate to those who will be primarily affected by its outcome, ie., those upon whom the financial burden created by the bonds will fall, is insufficient to withstand judicial scrutiny (J.S. 12a). Although Judge Thornberry admits that the principal and interest on the bonds will be paid solely from taxes on real, personal and mixed property rendered by the City's taxpayers, he concludes that the Texas laws exclude non-renderers who arguably will contribute to the repayment of the bonds indirectly through rents and purchased goods (J.S. 13a - 14a).

Judge Thornberry's analysis fails to consider two important factors: first, the tax bond election will unquestionably have a direct and

"disproportionate effect" on renderers, Salyer, supra at 728; Associated Enterprises, supra at 744; second, the Texas general obligation tax bond election laws do not absolutely prohibit anyone from rendering any item of property, and, therefore, qualify to vote. Montgomery Independent School District; Kramer; and McDonald. Furthermore, all those non-renderers who "indirectly" contribute to the payment of property taxes as lessees or purchasers of goods are in positions analogous to the lessees in Salyer. The Court in Salyer noted that the lessees had interests in the activities of the water storage district quite similar to that of landowners. However, this Court determined that those lessees could bargain with their lessors for the franchise by proxy. Also, it was reasoned that ". . .just as the lessee may by contract be required to reimburse the lessor for the district assessments so he may by contract acquire the right to vote for district directors." Salyer, at 733. Therefore, the lessees were not absolutely disenfranchised nor were they denied equal protection, although excluded from the franchise by state law, even though their lease contracts required the lessee to carry the proportionate share of the districts financial burden ostensibly assessed against and to be paid by his lessor. Obviously, non-renderers are not denied equal protection of the laws by virtue of the Texas rendering qualification since they have either ignored or refused to render some item of property, as required by law, even though they may be indirectly contributing to the payment of taxes which will be used to retire the bond indebtedness made the subject of the election.

In interpreting the treatment of alleged

interests of lessees in the Salyer case, it was noted in 27 Oklahoma L.Rev. 273, 278 (1974), that

> "An argument similar to the one in Phoenix was made in Salyer concerning lessees of real property. It was argued that lessees have interests indistinguishable from landowners and should be given the franchise since the cost of district projects would be passed along to the lessees in the form of higher rent. The Court reasoned that allowing lessees to vote would allow manipulation of the district by large landowners who could gain a majority on the board of directors through the use of numerous short term leases. This reasoning is questionable since there was evidence that the district was presently being manipulated by the one large landowner. The Court also reasoned that if a lessee 'feels that the right to vote in the election of directors of the district is of sufficient import to him, he may bargain for that right at the time he negotiates his lease.' This reasoning is also questionable when one considers the bargaining position of the lessee with a large landowner at the time he negotiates his lease. The Court appeared to be intent on rejecting the lessee argument of Phoenix."

Dissenting in Kramer, Mr. Justice Stewart noted generally, at 395 U.S. 637, that

> "Clearly a State may reasonably assume that its residents have a greater stake in the outcome of elections held within its boundaries than do other persons. Likewise, it is entirely rational for a state legislature to suppose that residents, being generally better informed regarding state affairs than are non-residents, will be more likely than nonresidents to vote responsibly. And the same may be said of legislative assumptions regarding the electoral competence of adults and literate persons on the one hand, and of minors and illiterates on the other. It is clear, of course, that lines thus drawn cannot infallibly perform their intended legislative function. Just as '(i)lliterate people may be intelligent voters,' nonresidents or minors might also in some instances be interested, informed, and intelligent participants in the electoral process. Persons who commute across a state line to work may well have a great stake in the affairs of the State in which they are employed; some college students under 21 may be both better informed and more passionately interested in political affairs than many adults. But such discrepancies are the inev-

itable concomitant of the line drawing that is essential to law making. So long as the classification is rationally related to a permissible legislative end, therefore - as are residence, literacy, and age requirements imposed with respect to voting - there is no denial of equal protection."

Later, in the context of Phoenix, Mr. Justice Stewart added, at 399 U.S. 217 and 218, that

"Under Arizona law a city's general bonded indebtedness effectively operates as a lien on all taxable real estate located within the city's borders. During the entire life of the bonds the privately owned real property in the city is burdened by the city's pledge - and statutory obligation - to use its real estate taxing power for the purpose of repaying both interest and principal under the bond obligation. Whether under these circumstances Arizona could constitutionally confer upon its municipal governing bodies exclusive and absolute power to incur general bonded indebtedness without limit at the expense of real property owners is a question that is not before us. For the State has chosen a different policy, reflected in both its constitutional and statutory law. It has told the governing bodies of its cities that

> while they are free to plan and propose capital improvements, general obligation bonds cannot be validly issued to finance them without the approval of a majority of those upon whom the weight of repaying those bonds will legally fall.
>
> This is not the invidious discrimination that the Equal Protection Clause condemns, but an entirely rational public policy."

Commenting upon the "primarily interested" analysis developed in Phoenix, the Supreme Court of Utah in Cypert v. Washington County School District, 473 P.2d 887, 892 (1970), stated that

> "In order to justify their declarations above quoted it would be necessary for the majority of that court to make a satisfactory answer to this question: If it be true that the nontaxpayers contribute 'as directly as property owners' to the servicing of the bonds, why is it so necessary that the bonds be general obligation bonds? The answer is obvious and inescapable: It is in order to make them salable; and they are salable because there stands behind them the power and the agreement for the levying of taxes upon the property within the district to guarantee their payment. Anyone who will take an honest

and realistic look at such a financing plan, and consider a comparison between a bond issue without such a 'general obligation' feature and one with it, will see very clearly that it is this power to tax the property in the district as the ultimate guarantee behind the bonds that makes such a project feasible. Whereas, if the bond issue were only to be paid through the indirect sources, as from those who pay no property tax, the bond purchasers would only be general creditors, without security. The result would be that the bonds would not be salable, nor the financing project feasible. It requires no further elaboration to show beyond peradventure of doubt that the taxpayers and their property have a very substantial commitment beyond those who are not such property taxpayers, and to demonstrate the complete unsoundness of the statement that the latter, 'contribute as directly as property owners.'"

In further interpreting the Salyer case, it is noted, at 27 Oklahoma L.Rev. 273, 279 (1974), that

"As was pointed out in Salyer: 'Nor, since assessments against landowners were to be the sole means by which the expenses of the district were to be paid, could it be said to be

> unfair or inequitable to repose the franchise in landowners but not residents.' The Salyer case indicates that if one class solely is to pay for something, it is more substantially interested and affected than are those who are not to pay even though those who do not pay may be substantially interested and affected in some other way. In other words, the interested and affected test as applied appears to mean economically interested and affected."

In 1971, this Court rendered a decision in Gordon v. Lance, 403 U.S. 1 (1971), which upheld West Virginia laws requiring a 60% supermajority vote in referendum elections held to approve bonded indebtedness or tax increases above limits established by the Constitution of West Virginia. Mr. Chief Justice Burger, speaking for the majority, stated at 403 U.S. 7 and 8, that

> "Whether these matters of finance and taxation are to be considered as less 'important' than matters of treaties, foreign policy or impeachment of public officers is more properly left to the determination by the States and the people than to the courts operating under the broad mandate of the Fourteenth Amendment. It must be remembered that in voting to issue bonds voters are committing, in part, the credit of infants and of generations

> yet unborn, and some restriction on such commitment is not an unreasonable demand. That the bond issue may have the desirable objective of providing better education for future generations goes to the wisdom of an indebtedness limitation: it does not alter the basic fact that the balancing of interests is one for the State to resolve.
>
> Wisely or not, the people of the State of West Virginia have long since resolved to remove from a simple majority vote the choice on certain decisions as to what indebtedness may be incurred and what taxes their children will bear."

This Court's decision in Gordon was interpreted in a footnote, in 47 Washington L.Rev. 391 (1972), to indicate that

> "It can be said that the only reason for supermajority requirements in local bond elections is the protection of property taxpayers from high tax indebtedness placed on them by non-property owners. The protection of property owners would seem to be unconstitutional under Cipriano v. City of Houma, 395 U.S. 701 (1969), although a distinction might be made because Cipriano involved the outright denial of the franchise to non-property

> owners. The Court's avoidance of attributing an impermissible purpose to a legislature in order to uphold a statute is in accord with general Court precedent."

Although this Court was not properly presented with the issue of the property ownership qualifications required in Idaho bond elections because that issue was not timely raised in the State courts, Edelman v. People of State of California, 344 U.S. 357 (1953); Louisville, etc. R.Co. v. Woodford, Kentucky, 234 U.S. 46 (1914), this Court dismissed the appeal in Bogert v. Kinzer, 93 Idaho 515, 465 P.2d 639 (1970), appeal dismissed, 403 U.S. 914 (1971) for want of a substantial federal question. That appeal, as presented to this Court, involved a challange to Idaho laws requiring a two-thirds supermajority vote in general obligation bond elections. Limited to those facts, this Court dismissed the appeal relying on Gordon. However, the challenged Idaho laws, as admitted in the state court decision, permit only real property taxpayers to cast votes in the general obligation bond election, therefore, requiring a two-thirds majority of real property taxpayers. The dissent in the state court recognized the true reason for the Idaho laws stating that:

> "The articulated state interest in requiring a 2/3 majority vote in bond elections is a prudent fiscal policy which requires that there be a substantial approval of a given project before a municipality embarks on a

> voyage of increased indebtedness. This state policy of fiscal restraint would have more weight if it was not already safeguarded by the constitutional requirement that voters at bond elections must be property owners. In the recent case of Muench, et al. v. Paine, et al., 93 Idaho 473, 463 P.2d 939 (January 16, 1970) this Court upheld this constitutional provision. This Court held that property owners as taxpayers, by and large have a greater and more permanent economic stake in the community than non-property owners." 465 P.2d at 650.

Since protection of property taxpayers is the essential state interest in requiring supermajorities in bond elections, it is significant to note that had Texas laws required a 60% supermajority rather than rendition of property for taxation as a means of protecting the primary interests of those who would bear the burden of retiring the bond indebtedness, then the April 11, 1972 Fort Worth general obligation bond election would still have failed, receiving the approval of only 52.2% of all votes cast.

It is submitted that, given the important state interest in protecting property taxpayers as implicitly approved in Gordon, the Texas property rendering laws not only attain that important state goal, but do it with a greater degree of precision than any supermajority requirement could possibly reach.

Also, Judge Thornberry argues that the present rendering voters will not be exactly the same renderers who will eventually repay the bonds due to "upward mobility" of the people and other factors. (J.S. 13a - 14a). Judge Thornberry's concern with the fact that the present voting renderers will not be the same ones who will eventually repay the bonds simply fails to recognize the fact that the exact same voters who cast votes in any election of any duration, will not be the exact same people who will have to abide by that decision as time passes. Judge Thornberry's argument is thoroughly answered in Gordon wherein the importance of a bond election is deemed reason enough to permit a state to require even supermajority approval because ". . . in voting to issue bonds voters are committing, in part, the credit of infants and of generations yet unborn, and some restriction on such commitment is not an unreasonable demand."

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mike Willatt, Assistant Attorney General of Texas, as of counsel for Appellant herein and member of the Bar of the Supreme Court, hereby certify that true and correct copies of the above foregoing Brief for the Appellant have been served upon the several parties thereto, in compliance with Rule 33(1) of the United States Supreme Court Rules, by placing three copies in the mail, first class postage prepaid, to S. G. Johndroe, Jr., City Attorney and Attorney for Appellees R.M. Stovall, S. G. Johndroe, Jr., Roy A. Bateman, Leonard E. Briscoe, Taylor Gandy, Jess M. Johnston, Jr., W. S. Kemble, Jr., John O'Neill, Ted C. Peters, Pat Reece, Mrs. Margaret Rimmer, and the City of Fort Worth, at 1000 Throckmorton Street, Fort Worth, Texas 76102; and that three copies were placed in the mail, first class postage prepaid, to Don Gladden and Marvin Collins, attorneys for Appellees, at 702 Burk Burnett Building, Fort Worth, Texas 76102. All parties required to be served have been served.

Witness my hand this 25th day of November, 1974.

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